RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 3 - 2016
OFFICE OF THE CLERK

Nos. 16-285 & 16-3[illegible]

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Seventh and Ninth Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS COURT MUST ADDRESS THREE DISTINCT ISSUES TO FULLY RESOLVE THE CONFLICT AMONG THE LOWER COURTS 4

A. The Two Statutes 5

B. The Legal Issues 7

1. Does The NLRA Contain A "Contrary Congressional Command" Overriding The FAA? 7

2. Does Enforcing The Arbitration Agreement Waive A Right To Pursue Statutory Remedies Under The NLRA? 10

a. Does the right-to-pursue-statutory-remedies principle apply here? 11

b. Does enforcing the arbitration agreement waive an employee's right to pursue statutory remedies under the NLRA? 13

c. Even if Section 7 creates a right to participate in class actions, does arbitration prevent effective vindication of Section 7 rights? 16

TABLE OF CONTENTS—continued

Page

3. Is The D.R. Horton Rule A Basis "At Law Or In Equity For The Revocation Of Any Contract"? 17

II. GRANTING THE PETITIONS IN THESE TWO CASES IS ESSENTIAL TO PUT BEFORE THE COURT THE FULL RANGE OF RELEVANT ISSUES. 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Express Co. v. *Italian Colors Rest.*,
133 S. Ct. 2304 (2013) ..... *passim*

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997) 12

AT&T Mobility LLC v. *Concepcion*,
563 U.S. 333 (2011) ..... *passim*

Birchfield v. *North Dakota*,
136 S. Ct. 2160 (2016) 4, 24

Brady v. *Nat'l Football League*,
644 F.3d 661 (8th Cir. 2011) 13

Chevron, U.S.A., Inc. v. *Nat. Res. Def. Council, Inc.*,
467 U.S. 837 (1984) 15

CompuCredit Corp. v. *Greenwood*,
132 S. Ct. 665 (2012) ..... *passim*

In re D.R. Horton, Inc.,
357 NLRB No. 184, 2012 WL 36274 ..... *passim*

D.R. Horton v. *NLRB*,
737 F.3d 344 (5th Cir. 2013) 9, 15

Deposit Guar. Nat'l Bank, Jackson, Miss. v. *Roper*,
445 U.S. 326 (1980) 12

TABLE OF AUTHORITIES—continued

Page(s)

DIRECTV, Inc. v. *Imburgia*,
136 S. Ct. 463 (2015) 1, 6

Discover Bank v. *Superior Court*,
113 P.3d 1100 (Cal. 2005) 19, 20, 23

Doctor's Assocs., Inc. v. *Casarotto*,
517 U.S. 681 (1996) 18

Eastex, Inc. v. *NLRB*,
437 U.S. 556 (1978) 13, 14

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 5

Gilmer v. *Interstate/Johnson Lane Corp.*,
500 U.S. 20 (1991) 7, 8, 10

Iskanian v. *CLS Transp. L.A., LLC*,
327 P.3d 129 (Cal. 2014) 9, 15, 21, 23

KPMG LLP v. *Cocchi*,
132 S. Ct. 23 (2011) (per curiam) 5

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*,
473 U.S. 614 (1985) 5, 8, 11

Perry v. *Thomas*,
482 U.S. 483 (1987) 18

TABLE OF AUTHORITIES—continued

Page(s)

Riley v. *California*,
134 S. Ct. 2473 (2014) 4, 24

Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*,
490 U.S. 477 (1989) 7, 8

Shearson/Am. Express Inc. v. *McMahon*,
482 U. S. 220 (1987) 3, 8

Wash. State Dep't of Social & Health Servs. v. *Guardianship Estate of Keffeler*,
537 U.S. 371 (2003) 13

Zubik v. *Burwell*,
136 S. Ct. 1557 (2016) (per curiam) 4, 24

STATUTES AND RULES

7 U.S.C. § 26(n)(2) 8

9 U.S.C.
§§ 1-16 1
§ 2 ..... 3, 6, 17

12 U.S.C. § 5518(b) 8

15 U.S.C. § 1226(a)(2) 8

28 U.S.C. § 2072(b) 12

TABLE OF AUTHORITIES—continued

Page(s)

29 U.S.C.
§ 157 ..... *passim*
§ 158(a)(1) 7
§ 159(a) 17
§ 626(b) 10

Fed. R. Civ. P. 23 12

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in these cases.[1]

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in both cases received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk, except respondents in No. 16-300, whose letter of consent has been filed concurrently with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases—and two other pending petitions[2]—bring before the Court the determination by the National Labor Relations Board that agreements between employers and employees to arbitrate disputes on an individual basis constitute an unfair labor practice because, by precluding class actions, they interfere with "concerted activities" protected by Section 7 of the National Labor Relations Act ("NLRA"). *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, *enf. denied in relevant part sub nom. D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013).

The issue has caused an untenable split among the lower courts and is of broad national importance, implicating employment contracts involving millions of employees. It clearly merits this Court's review.

Rather than elaborating on the reasons why review is warranted—which are discussed in detail in the petitions—this brief focuses on the other important question the Court must resolve at the certiorari stage: which petitions the Court should grant.

To answer that question, it is first necessary to identify the multiple issues that the Court will be required to address in order to resolve conclusively whether the National Labor Relations Act overrides the Federal Arbitration Act's mandate that arbitration be enforced. Then, the Court must determine which questions presented encompass all of the relevant issues.

---

[2] No. 16-307 (*NLRB* v. *Murphy Oil USA, Inc.*), and No. 16-388 (*Patterson* v. *Raymours Furniture Co.*).

In our view, that important consideration weighs heavily in favor of granting the petitions in these cases (Nos. 16-285 and 16-300), irrespective of whether the Court also grants the government's petition in No. 16-307 (*Murphy Oil*).[3]

The Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule:

- Whether the FAA's "mandate" that arbitration agreements be enforced is "overridden by a contrary congressional command" in the NLRA. *Shearson/Am. Express Inc.* v. *McMahon*, 482 U. S. 220, 226 (1987).
- Whether an arbitration agreement precluding class proceedings is invalid because it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310.
- Whether application of the *D.R. Horton* rule is permissible under the "savings clause" of Section 2 of the FAA, which allows arbitration agreements to be denied effect based on generally applicable "grounds * * * at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only

---

[3] A fourth petition, in *Patterson* v. *Raymours Furniture Co.*, No. 16-388, also raises the issue discussed here. The petitioner in *Patterson* does not seek plenary review and instead requests that the Board's petition in No. 16-307 (*Murphy Oil*) be granted. See Pet. for Certiorari 9, 29, No. 16-388.

one of these issues—whether the *D.R. Horton* rule falls within the FAA's savings clause. That blinkered focus excludes critical issues that the Court will be required to address and, therefore, would not put before the Court the multiple legal issues it must decide to resolve the conflict definitively.

Therefore, regardless of whether the Court grants the government's petition, we urge the Court to grant the petitions in *Epic Systems* and *Ernst & Young*. Both petitions frame the question presented broadly and capture all of the relevant inquiries.

In recent Terms, the Court has granted multiple petitions in the Fourth Amendment blood alcohol cases (see *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016)), the Affordable Care Act/Religious Freedom Restoration Act cases (see *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam)), and the Fourth Amendment cell phone cases (see *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014)) to ensure a full presentation of the issues. It should cast a broad net here as well.

ARGUMENT

I. THIS COURT MUST ADDRESS THREE DISTINCT ISSUES TO FULLY RESOLVE THE CONFLICT AMONG THE LOWER COURTS.

The issue presented by these petitions is important, frequently recurring, and the subject of a deep and intolerable split among the federal courts of appeals and state courts of last resort. This Court's review is manifestly warranted.

This dispute, at bottom, requires the Court to reconcile two federal statutes, a function that the

Court is often called upon to perform in a variety of contexts. When faced with the task of reconciling other federal laws with the FAA, the Court has distilled its general approach into two well-developed legal tests.

First, the Court asks whether the other federal statute contains a "contrary congressional command" overriding the FAA.

Second, the Court assesses whether an arbitration agreement "operat[es] as a prospective waiver of a party's right to pursue statutory remedies" created by the other federal law.

The Board relies principally on a third ground to justify its *D.R. Horton* rule, arguing that the rule falls within the FAA's "savings clause."

The Court must address each of these issues to resolve conclusively the dispute presented by the pending petitions. These issues in turn raise a number of subsidiary questions. (In the Chamber's view, none of these inquiries justifies the Board's *D.R. Horton* rule.)

A. The Two Statutes.

As the petitions explain, these cases involve the interaction of two federal statutes: the Federal Arbitration Act ("FAA") and the National Labor Relations Act ("NLRA").

The FAA. Enacted in 1925, the FAA was intended to "reverse the longstanding judicial hostility to arbitration agreements," *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002), and substitute "an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985)).

The statute mandates the enforceability of arbitration agreements, providing that they are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In the absence of such generally applicable grounds, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (quotation marks, brackets, and citations omitted).

This Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted); see also *Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers); *Concepcion*, 563 U.S. at 340, 352.

The arbitration agreements in the cases currently before the Court all require disputes to be arbitrated on an individual basis, and prohibit class proceedings.

The National Labor Relations Act. Section 7 of the NLRA, which was enacted in 1935, protects the right of covered employees to organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8, in turn, makes it unlawful for employers to "interfere

with, restrain, or coerce employees in the exercise of" these rights. *Id.* § 158(a)(1).

In the Board's view, an employee's participation in a class or collective lawsuits is a form of "concerted activit[y]" under Section 7, and agreements to arbitrate disputes on an individual basis infringe upon that right in violation of Section 8.

B. The Legal Issues.

1. Does The NLRA Contain A "Contrary Congressional Command" Overriding The FAA?

Background. When plaintiffs argue that another federal statute provides grounds for invalidating an arbitration agreement, this Court has asked whether the other federal statute contains a "contrary congressional command' overriding the FAA's mandate that arbitration agreements be enforced. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). This Court has been loath to find that test satisfied, holding that if a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 673.

The Court outlined the "contrary congressional command" test almost thirty years ago in *McMahon*, 482 U.S. at 226. "[I]n every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement," this Court "begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." Pet. App. 29a, No. 16-300 (Ikuta, J., dissenting); see *CompuCredit*, 132 S. Ct. at 669; *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas* v. *Shearson/Am. Ex-*

press, Inc., 490 U.S. 477 (1989); *Mitsubishi Motors*, 473 U.S. at 640.

Under this test, "[t]he burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

The Court has explained, moreover, that when Congress wants to override the FAA in a particular context, it does so with "clarity" by mentioning arbitration expressly in the text of the statute. *CompuCredit*, 132 S. Ct. at 672 (citing 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5518(b); and 15 U.S.C. § 1226(a)(2)).

The "contrary congressional command" standard is a demanding one. Indeed, each time this Court has applied the test, it has concluded that the federal statute at issue did not evince the requisite "contrary congressional command." See *CompuCredit*, 132 S. Ct. at 673 (Credit Repair Organizations Act); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 484 (Securities Act of 1933); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 640 (Sherman Act).

To prevail under this framework, the respondents in *Epic* and *Ernst & Young*, and the Board in *Murphy Oil*, would have to establish that the NLRA contains clearer language precluding individual arbitration than the statutes found insufficient in the preceding cases. That is a tall order.

Analysis. The text of the NLRA does not mention arbitration. That fact alone is dispositive of the issue.

As this Court explained in *CompuCredit*, when a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." 132 S. Ct. at 673. See also *D.R. Horton* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (noting that Congress "did not discuss the right to file class or consolidated claims against employers" in the NLRA); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014) (Liu, J.) ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

The Board, in its *Murphy Oil* decision, asserted that Section 7 of the NLRA overrides the FAA by providing a right to engage in "concerted activities." Pet. App. 45a-46a, No. 16-307 . But that general phrase does not clearly refer to litigation, let alone negate the FAA's protection of individual arbitration. And as the dissents from the NLRB's *Murphy Oil* decision explain, there are compelling arguments that the NLRA unambiguously precludes the *D.R. Horton* rule. Pet. App. 89a-208a, No. 16-307 . At a minimum, the statutory text is ambiguous regarding the permissibility of the rule.

Even if Section 7 could be read, on balance, to protect access to class- or collective-action mechanisms, that would not be sufficient to override the FAA. The Credit Repair Organizations Act ("CROA") expressly allows plaintiffs to bring actions in court, expressly specifies standards governing class actions, and prohibits the waiver of "any right * * * under this sub-chapter," but this Court held in

CompuCredit that these provisions failed to "do the heavy lifting" necessary to displace the FAA. 132 S. Ct. at 670.

The ADEA goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; see also *Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions."). If the CROA and the ADEA did not provide the necessary "contrary congressional command," Section 7's far vaguer reference to "concerted activit[y]" surely does not permit a different result.

2. Does Enforcing The Arbitration Agreement Waive A Right To Pursue Statutory Remedies Under The NLRA?

Parties seeking to invalidate arbitration agreements have also argued that—even in the absence of a clear congressional command overriding the FAA—the arbitration agreement should be invalidated because it would as a practical matter prevent a party from pursuing a remedy conferred by federal law.

This Court has held that an arbitration agreement is not protected by the FAA when it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310. That exception "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Ibid.*; see also *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

a. *Does the right-to-pursue-statutory-remedies principle apply here?*

Background. The Court's precedents address this principle only in the context of arguments that arbitration as a practical matter prevents a claimant from invoking a cause of action conferred by a federal statute. Thus, this principle would bar enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and might also "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Italian Colors*, 133 S. Ct. at 2310-11.

Absent such restrictions, the right-to-pursue-statutory-remedies principle does not apply. For example, the parties' agreement to arbitrate in *CompuCredit* was enforceable because it preserved "*the legal power to impose liability*" under the CROA. 132 S. Ct. at 671 (emphasis in original). Similarly, in *Mitsubishi Motors*, this Court held that agreements to arbitrate antitrust claims were enforceable because a plaintiff could still "vindicate *its statutory cause of action* in the arbitral forum, [and] the statute [would] continue to serve both its remedial and deterrent function." 473 U.S. at 637 (emphasis added).

Analysis. Here, there is no claim that employees are unable to vindicate in arbitration a cause of action conferred by a federal statute. Rather, the argument is that Section 7 confers a right to engage in concerted litigation, and therefore overrides the

FAA's right to enforce contracts that preclude class actions.

But that assertion appears to collapse into the argument that the NLRA evinces a "contrary congressional command"—which is how the Court analyzes contentions Congress has displaced the FAA by authorizing procedures inconsistent with arbitration, such as by expressly providing for the filing of actions in court and vindication of a statutory right through class actions. See pages 7-8, *supra*. Applying the right-to-pursue-statutory-remedies principle in this different context would circumvent that legal standard.[4]

---

[4] The Board insists that the right to participate in class and collective actions that it has read into Section 7 of the NLRA is "substantive," and references to class actions in other statutes are "procedural." But there is no principled basis for distinguishing Congress's express authorization of class actions in CROA and the ADEA from the Board's claimed authorization of class proceedings in Section 7—all confer legal authority to engage in class actions. In addition, regardless of the label affixed by the Board, the fact remains that a class action is a procedural device for pursuing a remedy. It is not the remedy itself. As this Court put it some 35 years ago, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 332 (1980) (emphasis added); see also, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997) (noting that Rule 23 does not "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)).

b. *Does enforcing the arbitration agreement waive an employee's right to pursue statutory remedies under the NLRA?*

Even if the "effective remedy" cases could somehow be expanded to encompass claims of a statutory "right" to procedures—when the claimed "right" is too vague to displace the FAA under the contrary congressional command test—they could not save the *D.R. Horton* rule.

The threshold question under this analysis would be whether Section 7 of the NLRA creates a right to engage in class actions. Section 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. § 157.

The Board maintains that this right to engage in "concerted activit[y]" includes "the right to engage in the collective pursuit of work-related legal claims" in litigation, including through class actions. Pet. for Certiorari 10, No. 16-307 (citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 (1978), and *Brady* v. *Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011)).

But Section 7 does not mention litigation—and, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Social & Health Servs.*

v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted). The reference to "other concerted activities" in Section 7 therefore should be read to encompass activities similar to the three enumerated activities of self-organizing, participating in labor unions, and collective bargaining—not bringing class action lawsuits.[5]

If Section 7's protection could extend to concerted litigation activity, a class action is not "concerted" activity at all: "an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees." Pet. App. 148a, No. 16-307 (Member Johnson, dissenting). While a class action may affect the rights of absent class members, that alone has never been held sufficient to make an action "concerted" for Section 7 purposes. See *id.* at 148a-154a (examining cases and noting complete lack of support for Board's position that a class action is "concerted" activity).

Indeed, Section 7's reference to concerted activities cannot have been intended to confer a right to

---

[5] The *Eastex* case cited by the Board involved the distribution of newsletters, not litigation. This Court stated only that "*it has been held that* the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"—citing lower court rulings in support of that proposition. 437 U.S. at 565-66 & n.15 (emphasis added). Moreover, the Court took the unusual step of expressly disclaiming any determination as to whether Section 7 encompasses litigation—by following its citation of those lower court decisions with the statement that "we do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15. *Eastex* therefore provides no support whatever for the contention that litigation-related activities are protected under Section 7.

engage in class actions, because the NLRA was enacted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362 (emphasis added); see also *Iskanian*, 327 P.3d at 141. Simply put, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362.

This Court employed precisely this reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309. So too here, because the NLRA long predated the advent of class actions, it cannot be read to protect a right to participate in class actions.

The Board argues, of course, that its ruling is entitled to deference. Pet. for Certiorari 12, No. 16-307. But because the NLRA unambiguously does not create a right to file class actions, no deference is warranted. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). And even if Section 7 were ambiguous, the question whether the *D.R. Horton* rule provides grounds for invalidating arbitration agreements is governed by the FAA—a statute for which the Board's interpretations are not entitled to deference. Thus, the Court must read the statute for itselt, without any deference to the Board's position, and the best reading is that Section 7 does not guarantee a right to class actions.

c. *Even if Section 7 creates a right to participate in class actions, does arbitration prevent effective vindication of Section 7 rights?*

Even if Section 7 could be read to create a right to participate in class actions, the Board would still have to show that arbitration on an individual basis prevents the effective vindication of that right. There are powerful arguments that it does not.

Employees who sign agreements to arbitrate on an individual basis can still engage in myriad forms of concerted activity, including striking, collective bargaining, and organizing. And even within the realm of litigation, employees are left free to communicate with co-workers about workplace problems, to exhort their co-workers to bring claims, to testify in each other's cases, to jointly retain the same counsel, to share evidence, and to pool resources to fund litigation. The *only* thing restricted by agreements to arbitrate on an individual basis is employees' ability to bring class actions.

Indeed, the Justices who dissented in *Italian Colors*—concluding that the arbitration agreement there violated the effective vindication principle by precluding collective action—expressly recognized that "the agreement could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism" for coordination among claimants. 133 S. Ct. at 2318 (Kagan, J., dissenting).

Moreover, the Board's position that the "right" to participate in class actions cannot be waived fails to acknowledge that just as the NLRA protects concerted activity, it also protects the right of employees to

"refrain from" concerted activity. 29 U.S.C. § 157. And in Section 9(a), it guarantees "any individual employee * * * the right at any time to present grievances to their employer and to have such grievances adjusted." *Id.* § 159(a). Thus, as a dissenting Board member has explained, "[t]aken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers—and not the NLRB—to choose for themselves *whether* to pursue non-NLRA disputes on a 'collective' versus 'individual' basis." Pet. App. 124a, No. 16-307 (Member Miscimarra, dissenting).

The right-to-pursue-statutory-remedies argument thus fails for three separate reasons: that principle is not applicable when, as here, there is no showing that arbitration will prevent the plaintiff from litigating a federal cause of action; Section 7 does not create a right to bring class actions; and, even if it does, enforcement of the arbitration agreement does not prevent vindication of that "right."

3. Is The D.R. Horton *Rule A Basis "At Law Or In Equity For The Revocation Of Any Contract"?*

Background. The FAA's "savings clause" provides that an arbitration agreement may be held unenforceable "upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. Parties seeking to invalidate arbitration agreements have invoked this clause to argue that various state law contract principles are protected against preemption by the savings clause.

In rejecting many such contentions, this Court has held that the exception created by the savings clause is narrow. It allows "agreements to arbitrate

to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Based on that precedent, this Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted).

The NLRB, in its petition for certiorari in No. 16-307, nonetheless relies principally on the savings clause as the ground on which the *D.R. Horton* rule can be sustained. Indeed, the NLRB's question presented focuses exclusively on this line of argument. (The Seventh and Ninth Circuits also relied principally on the savings clause in upholding the *D.R. Horton* rule.)

Analysis. The NLRB's reliance on the savings clause is curious, because *none* of this Court's previous decisions addressing the interplay between the FAA and another federal statute has even mentioned the savings clause.

The contention that the *D.R. Horton* rule falls within the savings clause rests on the following syllogism: Under the savings clause, arbitration agreements can be invalidated based on "such grounds as

exist at law or in equity for the revocation of any contract"; illegality is a generally applicable ground for invalidating contracts; the NLRA (according to the Board in *D.R. Horton*) makes agreements to arbitrate disputes on an individual basis illegal, because such agreements infringe upon employees' Section 7 right to engage in "concerted activity"; thus, the NLRA's prohibition is covered by the savings clause. See Pet. App. 14a-15a; Pet. App. 17a, No. 16-300; Pet. for Certiorari 13-14, No. 16-307.

But that is the precise syllogism that the respondents in *Concepcion* invoked in defense of California's *Discover Bank* rule. Like the *D.R. Horton* rule, the *Discover Bank* rule "conditioned the enforcement of arbitration on the availability of class procedure," either in court or in arbitration. See *Italian Colors*, 133 S. Ct. at 2312. The California Supreme Court announced in *Discover Bank* that a class waiver—whether in an arbitration agreement or otherwise—is an unenforceable exculpatory clause when it "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

The respondents in *Concepcion* argued that "[t]he savings clause expressly preserves state-law contract principles that do not discriminate against arbitration"; that "'the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California

law that does not specifically apply to arbitration agreements, but to contracts generally'"; and that "[t]he approach courts have taken to class-action bans in nonarbitration agreements * * * demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." Br. for Resp'ts at 13, 21, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *13, *21 (quoting *Discover Bank*, 113 P.3d at 1112).

This Court flatly rejected that syllogism. It explained that "[a]lthough § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Observing that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

The same is true of the NLRB's rule conditioning enforcement of employment arbitration agreements on the availability of class procedures. *Concepcion* therefore compels the conclusion that the *D.R. Horton* rule falls outside the savings clause.

The Board and the Seventh and Ninth Circuits attempt to distinguish *Concepcion* on various grounds, none of which withstands scrutiny. First, they argue that Section 7's protection of concerted

activity does not "discriminate" against arbitration. That argument was made and rejected in *Concepcion*: the respondents asserted that "[t]he state does not treat arbitration agreements in a manner different from that in which it otherwise construes nonarbitration agreements" and that "California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses," which is "applicable to all contracts and codified in California's law since 1872." Br. for Resp'ts at 18, 19, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *18, *19 (internal quotation marks omitted).

This Court held that facial neutrality is insufficient, explaining that if a generally applicable contract defense is "applied in a fashion that disfavors arbitration" or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it falls outside the savings clause. *Concepcion*, 563 U.S. at 341, 343. Thus, as the California Supreme Court observed in holding that the *D.R. Horton* rule cannot be reconciled with the FAA, "*Concepcion* makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141.

Second, the Board and the Seventh and Ninth Circuits argue that the *D.R. Horton* rule does not run aground on *Concepcion* because it leaves employers free to insist on bilateral arbitration so long as class procedures are available to employees in court. But the *Concepcion* respondents, too, pointed out that "California law is neutral as to whether classwide

proceedings take place in arbitration or in court." Br. for Resp'ts at 54, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *54.

This Court held, however, that such a hybrid approach was precluded by the FAA because it would undermine the objectives of arbitration. Although consumers would remain free to bring and resolve their disputes on a bilateral basis, there would be "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process"—"faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Concepcion*, 563 U.S. at 347.

Finally, the Board and the Seventh and Ninth Circuits have argued that *Concepcion* is distinguishable because it involved a state-law rule, whereas here a federal statute must be reconciled with the FAA. But the savings clause draws no distinction based on *the source* of the supposedly neutral contract-law defense. Moreover, while this Court did hold in *Concepcion* that "nothing in [Section 2's savings clause] suggests an intent to preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives" (563 U.S. at 343 (emphasis added)), it made clear in *Italian Colors* that the same principle applies to federal-law rules. 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 344).

Most importantly, if the Board were correct that the savings clause covers the *D.R. Horton* rule, a state statute purporting to guarantee individuals the right to "concerted action" would also fall within the savings clause. Yet that is exactly what California

courts already attempted to do in *Discover Bank*—and what *Concepcion* held the FAA forbids. Accordingly, "in light of *Concepcion*," such a reading of the NLRA "is not covered by the FAA's savings clause." *Iskanian*, 327 P.3d at 141.

That the *D.R. Horton* rule is the creation of a federal agency *is* relevant, but not to the savings clause. Rather, it brings into play the question whether, in enacting the NLRA, Congress authorized the Board to override the FAA. As we have explained (see pages 7-10, *supra*), there is no credible argument that Congress did so.

II. GRANTING THE PETITIONS IN THESE TWO CASES IS ESSENTIAL TO PUT BEFORE THE COURT THE FULL RANGE OF RELEVANT ISSUES.

As explained above, the Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule—analyzing the "contrary congressional command" issue; the right-to-pursue-statutory-remedies issue (and its several sub-issues); and the savings clause issue.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only the savings clause issue. Granting only that petition would not put before the Court all of the issues that must be resolved in order to determine definitively whether the *D.R. Horton* rule is valid.

For that reason, the Court should grant the petitions in these two cases, regardless of whether it also grants the government's petition. Both of these petitions frame the question presented broadly, and therefore clearly capture all of these threads.

The Court frequently grants multiple petitions when necessary to ensure a full presentation of all relevant legal issues. See *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016); *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam); *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014). It should follow that same approach here.

CONCLUSION

The petitions for writs of certiorari in these two cases should be granted.

Respectfully submitted.

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

OCTOBER 2016